No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees,

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants,

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

APPELLANTS' ARIZONA YORK REFRIGERATION COMPANY AND SOUTHERN ARIZONA YORK REFRIGERATION COMPANY'S OPENING BRIEF

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INDEX

TABLE OF CASES

AND

AUTHORITIES

TABLE OF CASES AND AUTHORITIES (Con't)

OTHER AUTHORITIES Page

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BASIS OF FEDERAL JURISDICTION

In its initial and Amended Complaint, plaintiff alleged it was a corporation incorporated under the laws of the State of Illinois, the defendants were domestic corporations incorporated under the laws of Arizona, and that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.00 (Transcript of Record, page 3). These facts vested jurisdiction in the United States District Court in Arizona as of the date the initial Complaint was filed, to-wit, October 19, 1956, in accordance with the provisions of Title 28, United States Code, Section 1332. Title 28, United States Code, Section 1291, confers appellate jurisdiction upon the Court of Appeals.

STATEMENT OF THE CASE

Hereinafter, references to the Transcript of Record are indicated as (T.R._____). For clarification purposes the parties to the within appeal shall generally be hereinafter designated as they were in the trial court, to-wit, Swift and Company, "Plaintiff", Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, "Defendants", or "Defendants York", and Authorized Supply Company of Arizona, "Third-Party Defendant".

This appeal, combined with the appeal of Authorized Supply Company of Arizona, is from the Findings of Fact and Conclusions of Law (T.R. 28) and Judgment (T.R. 36) of the District Court of the United States for the District of Arizona, dated September 18, 1958. By virtue of the Findings of Fact and Conclusions of Law and the Judgment, it was determined that plaintiff was entitled to recover from defendants the sum of $9,175.29, and costs. Defendant Southern Arizona York Refrigeration Company

was granted a judgment over against third-party defendant in the same amount. The filing of an appeal to this Court by third-party defendant has necessitated a concurrent appeal by defendants York.

The case arose as a result of ammonia damage, primarily to meat products of plaintiff, occurring on December 4 or 5, 1955 (T.R. 54) caused by defects in Bush refrigeration coils sold to plaintiff by defendant Arizona York Refrigeration Company pursuant to contract of May 31, 1955 (T.R. 159, 50). Defendant Arizona York Refrigeration Company had purchased the coils from third-party defendant (T.R. 155). It was uncontradicted that the sole cause of the damage to plaintiff's property was a manufacturer's defect in the Bush coils (T.R. 114, 132, 137 and 143).

Subsequent to the damage to plaintiff's products, the defective coils were returned by plaintiff to defendant Southern Arizona York Refrigeration Company (the successor to Arizona York Refrigeration Company, T.R. 160ff., 172ff., 31), and by the latter to Bush Manufacturing Company through third-party defendant (T.R. 166, 171 and 180). Replacement units supplied through third-party defendant (T.R. 171) were installed by defendant Southern Arizona York Refrigeration Company at plaintiff's plant without cost to it (T.R. 167, 170 and 180).

Suit was filed by plaintiff against defendants for damages for breach of express and implied warranties and negligence, and defendants joined Authorized Supply Company of Arizona as a third-party defendant, alleging breach of warranties and negligence. The negligence count against defendants was dismissed at the trial (T.R. 115), and by agreement de-

fendants' claim of negligence against third-party defendant was dropped.

Defendants' contentions at trial were primarily two-fold:

1. No warranties, express or implied, ran from them to plaintiff affording it protection for consequential damages, including loss of profits arising from the ammonia leakage, same not being within the reasonable contemplation of the parties, and that the only express warranties were as to parts and labor, in effect a replacement warranty.

2. Plaintiff's cause of action for damages for breach of warranties was irrevocably lost by its election of the remedy of rescission, to-wit, the return of the defective coils and their replacement with new coils without cost to the plaintiff.

SPECIFICATION OF ERRORS

1. The trial court erred in entering its Finding of Fact No. 7, that plaintiff and defendant Arizona York Refrigeration Company understood and contemplated that if the refrigeration system failed to operate efficiently and properly, loss and damage to meat products stored in plaintiff's plant would be the natural and probable consequence of the failure of such system, for the reason that the record is devoid of any evidence or testimony to establish such an intention, and said Finding is contrary to the evidence.

2. The trial court erred in entering its Finding of Fact No. 11, that neither plaintiff nor defendant Southern Arizona York Refrigeration Company intended, by the substitution of new Bush coils for the defective ones, to effect a rescission of any of the

agreements between them, for the reason that said Finding is not supported by and is contrary to the evidence in the action, and said Finding is immaterial, said substitution constituting a binding election of remedies as a matter of law.

3. The trial court erred in entering its Conclusion of Law No. 5, that in permitting the substitution of the new Bush coils plaintiff did not elect a remedy for its loss, for the reason that the evidence and the Findings of Fact entered by the Court, in particular Nos. 6, 8, 9 and 10, established a binding election of remedies as a matter of law.

4. The trial court erred in entering its Conclusion of Law No. 6, for the reasons that (a) by virtue of the substitution of new Bush coils plaintiff had made a binding election of remedies, and was precluded from recovering a judgment for damages against defendants, and (b) plaintiff was not entitled to recover any consequential damages from defendants, same not being within the contemplation of the said parties.

5. The trial court erred in denying defendants' motions for judgment made at the close of plaintiff's case and at the close of all the evidence for the same reasons assigned in Specifications Nos. 1 through 4 above.

6. The trial court erred in entering judgment against defendants for the same reasons assigned in Specifications Nos. 1 through 4 above.

ARGUMENT

THEORY OF THE CASE

The pleadings and the evidence at trial establish that the plaintiff sought recovery against the defend-

ants only on the theory of breach of express and implied warranties. The Amended Complaint asks damages for breach of warranties only as to "defective equipment" sold, to-wit, the Bush coils. Other than the dismissed negligence count, no other cause of action was stated, or attempted to be stated. All parties agree that the case is necessarily one falling within the confines of the Uniform Sales Act, Arizona Revised Statutes, Sections 44-201, et seq. The remedies sought by plaintiff, in particular the remedies for alleged breach of implied warranties, arose from the provisions of these statutes.

As admitted by the nature of plaintiff's action, the contract between Swift and Company and defendant Arizona York Refrigeration Company was a contract for sale of goods, not one for labor and materials. The Sixth Circuit has held that a contract for the installation of a refrigeration system in a slaughter house was one for the sale of goods rather than for labor and materials, and that the contract was within the implied warranty provisions of the Michigan Sales Act. *Burge Ice Machine Co. vs. Weiss,* 219 F.2d 573. The Court cited *Cox-James Co. vs. Haskelite Mfg. Co.,* 255 Mich. 192, 237 N.W. 548, holding that a contract for a waste conveyor system to perform a certain function was a sale within the Uniform Sales Act. It was held in *Service Conveyor Co. vs. Shatterproof Glass Corp.,* 219 F.2d 583, that a contract for the installation of a conveyor system in defendants' plant was one for the sale of goods rather than one for labor and materials, and, therefore, falls within the provisions of the Uniform Sales Act.

That work or labor is to be done on or in connection with the materials sold as an incident to, or in connection with, transfer of title to the material, does

not rob the transaction of its essential characteristics of a "sale" if the whole or any measurable part of the consideration for the performance of the contract is compensation for the material. *Fifteenth Street Inv. Co. vs. People,* 102 Col. 571, 81 P.2d 764. This case applies the rule to a contract to furnish, erect and install an elevator to specifications.

CONSEQUENTIAL DAMAGES

The judgment against defendants York is based upon plaintiff's contentions that said defendants breached express and implied warranties of fitness of the refrigeration system and its component parts sold under the contract of May 31, 1955. The specific language of the contract upon which the express warranty is predicated is contained in the trial court's Finding of Fact No. 5 (T.R. 29). The implied warranty relied on is based upon the language of Section 44-215 of the Arizona Revised Statutes.

Defendants submit that none of the language of the contract of May 31, 1955, (see plaintiff's exhibits 1 and 10) constitutes any more than a warranty or guaranty of parts and labor. All that was given to the plaintiff by the written contract and specifications was a replacement warranty; and in sense and reason that is all that could have been intended.

It is generally recognized that consequential damage from a breach of either or both express and implied warranties, is only recoverable when same might reasonably be supposed to have been contemplated or foreseen by the parties at the time the warranty was made as the probable result of the breach. See 46 Am.Jur., Sales, Section 741. Thus, A.R.S. Section 44-269G provides that normally the measure of damages is the difference between the value of the goods

sold at the time of delivery and the value they would have had if they answered to the warranty.

It is submitted that nothing in the contract between the parties shows any intention that the seller, Arizona York Refrigeration Company, should be liable to Swift and Company for consequential damages. It is not unreasonable to conclude that no such warranty was or could be intended, both parties knowing that the seller was not the manufacturer of the items sold. The burden of proof to establish an intention of the parties that consequential damages should also be covered rests upon the plaintiff. No such proof was offered at trial.

It should also be kept in mind that the coils in question were installed in a freezer room, and their sole purpose was to cool that room. Yet a substantial portion of the damages claimed occurred in a storage area outside the freezer room (T.R. 92 and 93), because the door to said room (with which the defendants had no connection whatever) came open, apparently because of a defective latch or improper adjustment, (T.R. 63ff., 90). It is unreasonable to presume any intention by defendant Arizona York Refrigeration Company (or any seller in a similar position) to accept almost absolute and unlimited liability for damages which might result from defective coils manufactured by another.

The authorities recognize that loss of profits is not recoverable unless same may reasonably be presumed to have been within the contemplation of the parties at the time when any warranties were made. See 46 Am.Jur. Sales, Section 743. There was no evidence whatever that it was contemplated by the parties to

the original contract that possible loss of profits from prospective sales of meat would be recoverable in the event of equipment failure. There is a necessary and reasonable limitation to the doctrine of foreseeability. Defendants York believe that reasonable men would not expect a seller of refrigeration equipment manufactured by another, to assume unlimited liability for unforeseeable failures in the subject of the sale. Would it be reasonable to hold the seller of similar equipment liable for all the damage done by fire in a five block business area, for example, if the fire was caused by a short circuit in a defective motor supplied by a third party? In circumstances such as these, any loss of profits is the remote, rather than the natural and proximate consequence of any breach of warranty. See 15 Am.Jur., Damages, Sections 151, 151 and 153.

Furthermore, plaintiff wholly failed to prove the necessary elements of its claim for damages for loss of profits, as it was unable to prove the cost to the Swift and Company unit, of any items for which it seeks recovery, (T.R. 87). There was no competent evidence from which any loss of profits could be computed with reasonable certainty.

CONCLUSIVE ELECTION OF REMEDIES

Appellants' York's argument on this point will necessarily parallel the argument of appellant Authorized Supply Company of Arizona, as the positions of said parties on this issue were essentially the same at the trial. So far as possible, these appellants will attempt to avoid expected and unnecessary duplication.

Plaintiff's cause of action for damages for breach of warranties was irrevocably lost by its election of the remedy of rescission, afforded it by A.R.S.

Section 44-269, (Section 69 of the Uniform Sales Act), subsection A 4. Subsection A provides:

> "Where there is a breach of warranty by the seller, the buyer may, at his election:
>
> 1. Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.
>
> 2. Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.
>
> 3. Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty.
>
> 4. Rescind the contract to sell or the sale and refuse to receive the goods or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which had been paid."

The evidence is uncontradicted that the defective coils were voluntarily returned by plaintiff Swift and Company to defendant Southern Arizona York Refrigeration Company and new coils were accepted by plaintiff in replacement without cost to it, (T.R. 166, 167, 170 and 180). As a matter of law these facts constituted a rescission and a binding election of remedies, and any intention of the parties to the contrary was wholly immaterial.

The applicable statute is unambiguous, and not subject to interpretation: "When the buyer has claimed and been granted a remedy in any one of these

ways, no other remedy can thereafter be granted." A.R.S. Section 44-269B.

The Arizona cases of *Yancy vs. Jeffreys,* 39 Ariz. 563, 8 P.2d 774, and *California Steel Products vs. Wadlow,* 58 Ariz. 69, 118 P.2d 67, pronounce the law in Arizona as to election of remedies, and the rule there announced that the remedies provided (A.R.S. Section 44-269) are mutually exclusive remains in full force and effect. In the *Yancy* case, after setting forth the alternative remedies which the buyer has in case of a breach by the seller, the Court said "He must, however, elect between these remedies, and is bound by his election". The *Wadlow* decision quoted from the earlier *Yancy* case, and went on to say, citing the predecessor Arizona statute, "The sales statute provides that when a buyer has claimed and been granted the remedy in any one of these ways, no other remedy can thereafter be granted". The overwhelming weight of authority would apply the election of remedies rule to the facts of this case. It is to be kept in mind that Section 69 of the Uniform Sales Act (A.R.S. Section 44-269) applies to both express and implied warranties.

The legal textbooks have no difficulty in recognizing and accepting the principle that the return of defective goods, and recovery of the purchase price (or the substitution of replacement goods) bars an action for damages caused by the defect. See 77 C.J.S., Sales, Section 355 (it is worth noting that this authority, at page 1265, cites the several cases reaching a different conclusion, including *Russo vs. Hochschild Kohn and Co.,* 184 Md. 462, 41 A.2d 600, 157 A.L.R. 1070, under a text reference to *an amendment* to Section 69 of the Uniform Sales Act, adding to the remedy

of rescission the right to bring action for damages resulting from the breach); 46 Am.Jur., Sales, Section 727; and 3 Williston on Sales, Section 612 p. 362 and Supplement. Nor have the courts had any difficulty with a proper interpretation of the election of remedies provision of the Sales Act and the exclusiveness of the remedy chosen, until, apparently, the *Russo* case was decided in 1945. As the annotation in 157 A.L.R., beginning at page 1077, points out, the *Russo* case "* * * appears to be the first, among the many on the subject in general, to hold that Section 70 of the * * * Uniform Sales Act * * * operates to except claims for special damages from the express provisions of Section 69 * * * ". It is submitted that the annotation makes it very clear that the *Russo* case and its rationale are unique and out of step with the accepted and reasoned doctrine. It should be noted that the judges in the *Russo* case could not wholly decide whether to base the decision upon Section 70 or the claimed intention of the parties as to rescission (see the concurring opinion). Both the majority and the concurring opinions make a pointed reference to the negligible value of the $1.50 hair lacquer pads involved. These factors should be considered, in light of the transparent effort of the judges to do "justice" at the expense of recognized law. Defendants submit that both the reliance on Section 70 by the majority, and the "intent of the parties" by the concurring judges was "make-weight" pure and simple to avoid the effect of what they considered the harshness of the inescapable meaning and intent of Section 69.

Section 70 (A.R.S. Section 44-270) is as integral a part of the original Uniform Sales Act as it was adopted in the states as Section 69 (A.R.S. Section 44-269). It is submitted that Section 70 has nothing

whatever to do with the subject matter of Section 69. On the contrary, Section 70 only has reference insofar as "special damages" are concerned to those situations or cases where *"special damages" have always been recognized as recoverable,* just as "interest" has been recoverable. The key to Section 70 is the language, "* * * where, by law, interest or special damages may be recoverable." If any of the dozens of legislatures which have enacted the Uniform Sales Act had intended the result reached in the *Russo* case and its few fellow cases, Section 69, subsection A 4 and/or B, would have been written in such a fashion as to clearly so provide.

The New York Legislature in 1948 felt it necessary to amend Section 69 of its sales act to permit the double remedy, notwithstanding the fact that the Maryland Court had decided the *Russo* case three years before. No such amendment has been enacted in Arizona.

The Court's attention is directed to *Bennett vs. Piscitello,* 170 Misc. 177, 9 N.Y.S.2d 69. At page 77 of the latter volume, a clear analysis, admittedly by a "lower" court, of the proper interpretation of Section 69 of the Uniform Sales Act is found, the Court rejecting the conclusion reached in *Waldman Produce vs. Frigidaire Corp.,* 284 N.Y.S. 167, saying:

> "A remedy in law, is a privilege to do, coupled with the right to demand. When the remedy is statutory, and is clearly and unequivocally expressed, the Court in applying it may neither subtract from its requirements nor add to its awards. It may construe and apply. It may not enlarge, no matter how just the addition. This is fundamental.

Sec. 150, subd. 1 (d), is both clear and explicit. It provides that where the buyer has met the requirements of rescission, he may "recover the price or any part thereof which has been paid." This language needs neither clarification nor comment. It both creates and limits the seller's obligation. Yet, in the Waldman Case, supra, the Court added to its obligation, by requiring the seller, in addition to returning the purchase price of the refrigerator, also to pay for the fruit it had spoiled; upon the theory of an implied promise brought into being by the breach of the very warranty which was the basis of the rescission upon which the action was founded. It is true that this additional obligation seemed to square with justice. It is true in the case at bar that the oil burned in excess of the warranty is a part of the direct damages. But in each of these cases, these damages could have been recovered in the second remedy given under Section 150, by keeping the goods and suing for all damages resulting from the breach of warranty. When the law creates or permits several remedies, it may not be assumed that each will attain full compensation in all cases. It is because of the possible varying conditions that the several remedies are created, and a choice given. If a party does not elect the most favorable, he should blame himself, rather than condemn the law. The choice having been voluntarily made, the Court must administer what has been selected. The defendants herein deliberately elected to rescind. They are thereby limited in their recovery to the amount they have paid on the purchase price."

The following cases (decided under identical provisions of the Uniform Sales Act or the selfsame for-

mer common law rule) are illustrative of the innumerable decisions holding that the return of the subject matter of the sale is irrevocable, and operates as a conclusive presumption of law that the buyer intended to rescind, the intent of the buyer being immaterial.

Henry vs. Rudge and Guenzel Co., 224 N.W. 294 (express warranties and exchange of shoes);

Boivard & Seyfang Mfg. Co. vs. Maitland, 92 Ohio St. 210, 110 N.E. 749 (exchange of steam engine);

Apex Chemical Co. vs. Compson, 171 N.Y.S. 61, (return of a vacuum pump);

Stanley Drug Co. vs. Smith, 313 Pa. 368, 170 A. 274 (the case quotes 2 Williston on Sales, 2nd Edition, Section 612, and holds "That a vendee who rescinds can only recover upon that basis (price) is evident, for it is exactly what the statute declares * * * The conclusion stated seems to be universal where the Uniform Sales Act is in force, as it is with us * * * ").

It is submitted that by its action in accepting the replacement coils without cost to it, plaintiff bound itself to the remedy of rescission, forsaking its right to bring an action for damages against defendants. The Arizona statutes and authorities are clear and controlling, and the authorities herein cited from other jurisdictions, interpreting the same provisions of the Uniform Sales Act, are equally persuasive.

CONCLUSION

For the foregoing reasons, and particularly in the event the Court should reverse the judgment in favor of defendants Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company, and against third-party defendant Authorized Supply Company of Arizona, the Court should reverse the judgment entered in the within action in favor of plaintiff Swift and Company and against these defendants.

Respectfully submitted,

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APPENDIX

Exhibit		Page of Transcript of Record Identified	Admitted
Plaintiff's	1	23, 47	47
	2	23, 47	47
	3	23, 47	47
	4	23, 47	47
	5	23, 47	47
	6	23, 47	47
	7	23, 47	47
	8	23, 47	47
	9	50	52
	10	51	52
	11	78	82
	12	117	118
Defendant's	A	23, 47	47
	B	23, 47	47
	C	23, 47	47
	D	23, 47	47
	E	23, 47	47
	F	23, 47	47
	G	23, 47, 167	168
	H	23, 47	47
	I	23, 47	47
	J	23, 47	47
	K	23, 47	47
	L	23, 47	47
	M	23, 47	47
	N	24, 47	47
	O	24, 47	47
	P	24, 47	47
	Q	24, 47	47
	R	24, 47	47
	S	26	26
	T	176	178
	U	176	178
	V	178	178
	W	179	182
	X	179	182
	Y	179	182
	Z	182	182
	AA	182	184
	AB	184	185
	AC	184	185
	AD	187	187
Third-Party Defendant's	A	24, 47	47
	B	24, 47	47
	C	24, 47	47
	D	24, 47	47
	E	24, 47	47